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No. 10-885

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE *CIOCA* PLAINTIFFS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Kori Cioca, and her fellow plaintiffs in *Cioca v. Rumsfeld*,[2] are veteran and active-duty servicemen and servicewomen who, while serving in the United States Army, Navy, Marine Corps, Coast Guard, or Reserves, have been raped or otherwise sexually assaulted by active duty members of the military. Pursuant to this Court's decisions in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) and *Davis v. Passman*, 422 U.S. 228 (1979), they have brought suit in a federal district court against Secretaries of Defense Rumsfeld and Gates, alleging that the Secretaries violated their constitutional rights by failing to take reasonable measures to reduce and prosecute instances of sexual assault and rape in the military.

This Court's discussion of *Chappell v. Wallace*, 462 U.S. 296 (1983), has caused some lower courts to believe the *Feres* doctrine serves to preclude *all*

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[1] No counsel for any party to this action authored any part of this brief, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. *See* SUP. CT. R. 37.6. Counsel of record for both parties were notified of *amici*'s intent to file this *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

[2] United States District Court, Eastern District of Virginia; Case No. 11CV151.

constitutional claims brought by our Nation's active-duty military servicemen and servicewomen. Consequently, because the *Cioca* Plaintiffs were active-duty servicemen and servicewomen when the Government violated their constitutional rights, they have a sincere interest in advocating for the elimination of the *Feres* doctrine.

The *Cioca* Plaintiffs respectfully submit this brief as *amici curiae*. The *Cioca* Plaintiffs believe the *Feres* doctrine should not stand. The consistent misapplication of that doctrine has resulted in numerous instances of servicemembers losing their right to seek judicial relief for the constitutional rights violations they suffer while serving their country.

SUMMARY OF THE ARGUMENT

In 1946, Congress passed the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"), which waived the United States' sovereign immunity for suits sounding in tort "under circumstances where the United States, if a private person, would be liable" to the claimant. In creating the FTCA, Congress explicitly drafted several statutory exceptions. None of the statutory exceptions exempts the military from the FTCA's waiver of sovereign immunity. In 1950, however, the Court looked beyond the plain text of the FTCA and created the *Feres* doctrine, a judicially crafted exception that bars claims by military servicepersons for injuries that arise out of or

are in "the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

Since many other *amicus* briefs have thoroughly discussed the absence of legislative history or statutory text to support the *Feres* doctrine's judicial creation, the *Cioca* Plaintiffs will not discuss those issues. Instead, the *Cioca* Plaintiffs draw the Court's attention to the manner in which the *Feres* doctrine, combined with this Court's decision in *Chappell v. Wallace*, 462 U.S. 296, 300 (1983), has misled lower courts into depriving servicemembers of their constitutional rights.

In *Chappell*, decided thirty-three years after the Court first introduced the *Feres* doctrine, the Court held that the *Feres* doctrine should "guide" lower courts in adjudicating the constitutional claims of military servicemen and servicewomen brought under *Bivens*. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (reasoning that although the circumstances in *Chappell* concerned only "limitations on the type of *nonstatutory* damage remedy recognized in *Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* [still] guides our analysis in this case.") (emphasis added). The Court subsequently explained in *Stanley v. United States*, 483 U.S. 669, 681 (1987) that it saw "no reason why [the Court's] judgment in the *Bivens* context should be any less protective of military concerns that it has been with respect to FTCA suits, where we adopted [the *Feres*] 'incident to service' rule." In *Stanley*, the Court merged the *Feres* doctrine

into the "special factors counseling hesitation" test in *Bivens*, affirming "the reasoning of *Chappell* that 'the special factors counseling hesitation' . . . require abstention in the inferring of *Bivens* actions as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson*." *Id.* at 683-84.

At present, many lower courts faced with a constitutional claim from service members inquire as to whether the constitutional claim arose "incident to service."[3] This is troublesome because it inappropriately limits lower courts' inquiry to whether a violation of a serviceman or servicewoman's constitutional rights occurred "incident to service." It is certainly one thing for a court to consider whether a *tort* occurred incident to service for purposes of the FTCA, but the adjudication of a *constitutional right violation* demands a higher degree of judicial consideration than the *Feres* doctrine "incident to service" analysis.

Constitutional right violations that invade bodily integrity, such as rape and sexual assault, should never be considered merely "incident to service."

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[3] *See, e.g., Brown v. United States*, 739 F.2d 362, 363 (8th Cir. 1984) (considering whether the *Feres* doctrine barred the plaintiff's constitutional claim based on a determination of whether the "injury was incident to his military service."); *see also*, *Morse v. West*, 975 F.Supp. 1379, 1381-82 (D.Colo. 1997) (finding "that the alleged incidents of harassment were incident to military service[, and consequently,] . . . barred because the military enjoys an immunity to *Bivens* claims that is coextensive with its *Feres* immunity.") (internal quotation marks and citations omitted).

Granting the Government unquestioned immunity for constitutional rights violations based on the *Feres* doctrine is wrong. Such analysis fails to consider the ramifications of absolving the military to any liability for constitutional rights violations. Any such immunity should only be the product of a doctrine that fully contemplates the balance of the constitutional rights at stake with an underlying policy rationale for granting the Government immunity. The *Feres* doctrine is not such a doctrine. Thus, this Court should reconsider and overturn the *Feres* doctrine.

ARGUMENT

Nothing in the *Feres* doctrine reflects the correct consideration a court must undertake in evaluating a *Bivens* constitutional claim. The *Feres* doctrine was not designed to adequately address the important issues raised when a serviceman or servicewoman presents a claim that his or her constitutional rights have been violated. Dismissing our military men and women's constitutional right claims pursuant to a cursory *Feres* "incident to service" inquiry violates the very democratic ideals and notions of liberty that our military fights to preserve.

I. The *Feres* Doctrine Should Not Bar Constitutional Claims

The underlying rationales for the *Feres* doctrine serve no rational purpose in a court's evaluation of a

serviceman or servicewoman's constitutional *Bivens* claim. That is, the "three broad rationales underlying the *Feres* decision" are in no way implicated by a court's consideration of the Government's liability for a constitutional rights violation. *See United States v. Johnson*, 481 U.S. 681, 688-89 (1987).

In *Johnson*, the Court once again affirmed its reliance on FTCA text and legislative history for its creation of the *Feres* exception, and the Court listed three policy justifications for its judicially created exception to the statute: the concept that "the relationship between the Government and members of its armed forces is 'distinctively federal in character' "; "the existence of . . . generous statutory disability and death benefits" for injured military personnel; and finally, the idea that the *Feres* exception precludes the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 688-91.

None of the three aforementioned *Feres* rationales justifies barring the review of constitutional claims of our Nation's servicemen and servicewomen brought under *Bivens*.

A. Distinctively Federal in Character

In articulating the first underlying rationale for the *Feres* doctrine, the *Feres* Court described the relationship between the Government and the members

of its armed forces as "distinctively federal in character." *Feres*, 340 U.S. at 143. Consequently, the Court's first justification for its creation of the *Feres* exception doctrine was predicated on an overview of a statutory scheme that incorporated divergent state laws and juxtaposed them on a particular entity – the military – that is purely federal in character.

In creating the *Feres* doctrine, the *Feres* Court recognized that the FTCA "assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious." *Feres*, 340 U.S. at 143. Because "a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight states, the Canal Zone, or Alaska, or Hawaii, or any other territory of the United States[,]" the Court reasoned that "[i]t would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* Thus, the *Feres* Court described the relationship between the Government and the members of its armed forces as "distinctively federal in character," based on a finding that "Congress could not have intended that local tort law govern the 'distinctively federal' relationship between the Government and enlisted personnel." *Johnson*, 481 U.S. at 694 (quoting *Feres*, 340 U.S. at 142-44).

Whether the relationship between the Government and its military can be described as "distinctively federal in character," however, has absolutely no bearing on a court's consideration of a constitutional *Bivens* claim. In stark contrast to the tort claims that arise under the FTCA, constitutional claims brought pursuant to *Bivens* can only arise from one source: the federal Constitution. There are no imaginable scenarios in which a constitutional *Bivens* claim brought by a military servicewoman or serviceman could change substantively based on where the constitutional right violation occurred. Consequently, what the *Johnson* Court articulated as the concern "that local tort law [might] govern the distinctively federal relationship between the Government and enlisted personnel" is not at play when courts consider a constitutional rights violation brought pursuant to *Bivens*.

Therefore, the first rationale underlying the creation of the *Feres* doctrine lends no support to the doctrine's recent migration into *Bivens*.

B. The Existence of an Alternative Recovery Scheme

Likewise, "[t]he second factor discussed in *Feres*, the presence of an alternative military compensation system, is no less nebulous than the first." *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980). In *Johnson*, the Court explained that "the existence of these generous statutory disability and death benefits

[in the Veterans' Benefits Act] is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Johnson*, 481 U.S. at 689.

The existence of a compensation scheme outside of the FTCA, however, is in no way pertinent to a court's consideration of a *Bivens* claim. Nothing in the Veterans' Benefits Act provides compensation for constitutional rights violations. The fact that the Veterans' Benefits Act provides "generous statutory disability and death benefits" for injured military service personnel provides no reason or rationale to conclude that these servicemen and servicewomen should be barred from suing to vindicate violations of their constitutional rights.

C. Military Discipline and Effectiveness

Third, and finally, "*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Johnson*, 481 U.S. at 690 (internal quotation marks and brackets omitted). Accordingly, lower courts have interpreted the third *Feres* rationale as prohibiting the courts from "delving into military matters and calling to bar military decisions and institutions." *Durant v. Neneman*, 884 F.2d 1350, 1352 (10th Cir. 1989). Or as the Eighth Circuit has labeled it, the

third rationale is predicated on "the fear of disrupting the military disciplinary structure." *Brown v. United States*, 739 F.2d 362, 365 (8th Cir. 1984).

This rationale, however, is not implicated in the context of *Bivens*, where military personnel sue for constitutional rights violations only. As the Court explained in *Brown*, it was the fear of "the extreme results that might obtain if suits under the Tort Claims Act were allowed for *negligent* orders given or *negligent* acts committed in the course of military duty [that] led the Court to read that Act as excluding claims of that character." *United States v. Brown*, 348 U.S. 110, 112 (1954) (emphasis added). Because *Bivens* claims arise out of constitutional violations and *not* mere acts of negligence that occur in the line of duty, there is less of a threat that a judicial inquiry into the *constitutional* injury will thwart military discipline and readiness. As opposed to ordinary orders or acts committed in the course of military duty, no military officer has the discretion to violate the constitutional rights of servicemembers. Consequently, judicial inquiry into constitutional rights violations occurring in the military can never intrude on a matter that is purely within the "military decisions and institutions."

Permitting egregious constitutional rights violations to continue unchecked drastically undermines the military's discipline and readiness. In 2009, the Department of Defense admitted that repeated rape and sexual assaults were undermining the

effectiveness and integrity of the entire military, noting:

> In the armed forces sexual assaults not only degrades individual resilience but also erodes unit integrity. Service members risk their lives for each other to keep fellow service members out of harm's way. Sexual assault breaks this important bond and tears apart military units. An effective fighting force cannot tolerate sexual assault within its ranks. Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable.

2009 *Annual Report on Sexual Assaults in the Military*.

Thus, in the context of sexual assault in the military, it is clear that application of the *Feres* doctrine does nothing to improve the readiness and effectiveness of our military. Instead, the lower courts' application of *Feres* to bar *Bivens* claims for constitutional rights violations resulting from rape and sexual assault has only served to perpetuate the ring of silence surrounding one of the gravest threats to the integrity of our military as a whole. *See also, Smith v. United States*, 196 F.3d 774, 778 (7th Cir. 1999) ("Sexual assault and sexual harassment is always demeaning and often permanently scars the victim. . . . Tolerance of such behavior [in the military] also results in a warping of military discipline, a

lack of military readiness, and a weakening of national security.").

Accordingly, this Court should overturn the *Feres* doctrine, or at the very least make clear that the doctrine does not bar the constitutional *Bivens* claims of our Nation's military personnel.

II. Constitutional Rights Violations Are Never "Incident To Service"

In contrast to claims sounding in tort, "constitutional claims are serious ones, involving the alleged deprivation of [a person's] fundamental rights." *Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D.Colo. 1996). A constitutional right violation is never simply a question of something that occurs "incident to service." Consequently, "[t]he potential injury[,] if review is refused[,] clearly outweighs any interference with military functions if review is granted." *Id.* In this regard, it is clear that the *Feres* doctrine, which was designed to adjudicate the Government's immunity concerning claims sounding in tort, is ill-equipped to consider the magnitude of some constitutional rights violations. The *Feres* doctrine lacks the necessary framework to reach a proper determination of whether a *constitutional* claim should be allowed to proceed past an initial jurisdictional determination.

The *Feres* framework is woefully inadequate for the task of remedying a constitutional right violation. Although the *Feres* doctrine was never designed to enable a court to consider granting governmental

immunity over constitutional claims, following the Court's decision in *Chappell*, lower courts now must struggle to analyze the constitutional rights of our military personnel within the *Feres* framework. Particularly problematic is that the *Feres* framework collapses what would otherwise constitute a constitutional right inquiry into one simple inquiry: whether the injury occurred "incident to service." *Feres*, 340 U.S. at 146. As a result, the application of the *Feres* doctrine to bar constitutional *Bivens* claims has – not surprisingly – caused our lower courts to reach some absurd and conflicting results.

The *Feres* doctrine has been inappropriately used to preclude a number of constitutional rights claims brought by our military personnel on the basis that the constitutional violations they suffered occurred "incident" to their "service." *See, e.g., Brown v. United States*, 739 F.2d 362, 363, 365 (8th Cir. 1984) (applying the *Feres* doctrine to bar constitutional rights claims arising out of a "mock lynching" that occurred while the plaintiff was "participating in National Guard training exercises" since, the court reasoned, "the *Feres* doctrine applied to bar a claim brought directly under the Constitution pursuant to *Bivens*.") (internal citations omitted); *Bartley v. U.S. Dept. of Army*, 221 F.Supp.2d 934, 937, 948 (C.D.Ill. 2002) (applying the Seventh Circuit's "in the course of activity incident to military service" *Feres* framework to dismiss the plaintiffs' claims that their constitutional rights were violated as a result of "continuing harassment and retaliation, including rape, sodomy,

unwelcome sexual advances and touching, requests for sexual favors, sexual innuendos, harassing phone calls, threats of physical harm, non-consensual sex and duress" in the hands of their military superiors); *Morse v. West*, 975 F.Supp. 1379, 1381 (D.Colo. 1997) (noting that since in "*Feres*, the Supreme Court held 'that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or in the course of activity incident to service[,]' . . . . the [plaintiff's] claims asserting violations of the Constitution pursuant to *Bivens* are . . . barred because the military enjoys an immunity to *Bivens* claims that is coextensive with its *Feres* immunity.") (internal citations and quotation marks omitted).

Other courts reviewing comparable claims found the *Feres* doctrine did not bar the constitutional claims of military personnel properly. *See, e.g., Saum v. Widnall*, 912 F.Supp. 1384, 1396 (D.Colo. 1996) (concluding that plaintiff's "claims that defendants targeted her for sexual harassment in violation of her constitutional rights . . . *are reviewable*. . . .") (emphasis added). In declining to apply the *Feres* framework to dismiss the plaintiff's claims, the district court in *Saum* reasoned that "[t]he deference due the Air Force in matters of training does not bar claims that, in this particular instance, defendants violated the rules and regulations governing such training or [the plaintiff's] constitutional rights. [The plaintiff's] claims tread on an area of expertise long conceded to

the courts. They are not so weak that review in this case would be futile." *Id.*

The *Feres* doctrine's overly-simplified "incident to service" inquiry should not be grounds to dismiss the constitutional claims of our military servicemen and servicewomen. Dismissing their constitutional claims based on a determination that the sexual assault or rape they suffered came about as a mere "incident to service" is nothing less than a betrayal of the men and women who risk their lives to protect our Nation and its democratic ideals. *See Gonzalez v. United States Air Force*, 88 Fed.Appx. 371, 379 (10th Cir. 2004) (Lucero, J., concurring) ("[N]o one should suggest that when young Americans sign up for military service, they can expect that potential sexual assaults upon them will be routinely considered 'incident' to that service.").

There is no legal basis on which to conclude military personnel should be singled out as a class of people who lack any remedies to prevent constitutional claims violations, yet the Court's *Feres* doctrine has led to that unjust result. The Court owes it to the men and women who sacrifice their lives for their country to overturn the *Feres* doctrine.

CONCLUSION

For the reasons set forth in this brief, and those set forth in the petition, the *amici curiae* ask the Court to **GRANT** the petition and overrule *Feres v. United States*.

Respectfully submitted,

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